BRUNEI REPORT

LIM HOCK THAI v. PUBLIC PROSECUTOR

[A.Cr.J. (Zimmern J.) September 18, 1980]

[Brunei — Criminal Appeal from the Court of the High Court No. 2 of 1980]

Penal Code, s. 292(a) — Video cassette tapes — Possession of obscene video tapes — Whether a video tape can be an obscene object within the meaning of obscene object under section 292(a) of the Penal Code — Ejusdem generis rule — Mischief rule.

The appellant was convicted on a charge of possession for the purpose of hire of obscene video tapes contrary to section 292(a) of the Penal Code. Counsel for the defence had argued that the *ejusdem generis* rule applied in this case and that the genus was publication of obscene books, pamphlets, paper, drawing, paintings, representations or figures therefore the genus could include only articles of a printed nature showing something obscene on their faces and video tapes were not such articles. On appeal he went further and submitted that the particular objects mentioned in section 292(a) were all objects which could be obscene to sight or upon reading and a video tape was not such an object. The prosecution relied on the mischief rule.

Held, allowing the appeal: the words of the section were so plain that no aid to construction was required. Under the section for an object to be obscene it had to be so to the sight or upon reading.

Case referred to:-

(1) *Public Prosecutor* v. *Tee Tean Siong & Ors.* [1963] M.L.J. 201.

CRIMINAL APPEAL.

S.P. Wong for the appellant.

Mohamed Ali bin Salleh (Acting Solicitor-General) for the Public Prosecutor.

Zimmern J.: The appellant was charged originally with possession of obscene video cassette tapes contrary to section 292(a) of the Penal Code before a learned magistrate sitting at Bandar Seri Begawan. In the midst of the hearing the charge was amended to one of possession for the purpose of hire.

He was convicted and sentenced to 2 weeks imprisonment and fined $1,000. He now appeals against both conviction and sentence.

Section 292(a) of the Penal Code reads:

"Whoever sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation makes, produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

Exception. — This section does not extend to any book, pamphlet, writing, drawing or painting kept on used *bona fide* for religious purposes or any representation sculptured, engraved, painted or otherwise represented on or in any temple, or on any car used for the conveyance of idols, or kept or used for any religious purpose."

He was charged on December 19, 1979 and at the hearing which commenced sometime in June 1980 the charge was amended to read and I quote verbatim:

"That you at about 1100 hours on the 17th day of December, 1979, at Shop No. 301 Seri Complex, Bandar Seri Begawan, in the State of Brunei, has in your possession obscene picture entitled 'The Punished Lovers' in Video cassette tape to wit, that certain parts of the tape are visually obscene and that you have thereby committed an offence punishable under section 292(a) of the Penal Code."

After the amendment the prosecution invited the court to view the tape or tapes which was acceded to.

After the viewing the prosecution officer, A.S.P. Chong, gave evidence. He told the court that after an application for and the issue of a search warrant he with others visited the Chong Hock Music Centre at a given address where he saw a number of video cassette tapes VHS and Betamax Systems. He approached the appellant who was there and told him he wished to seize the tapes for censorship and the appellant replied "all right". He seized 240 video tapes, issued the appellant a receipt therefor and brought them back to police headquarters. The police found 2 tapes under the label "The Punished Lovers" a tape for each system obscene. On December 19, i.e. two days later he telephoned the appellant and told him he would be charged with possession of two obscene tapes and the appellant was so charged. A.S.P. Chong was then cross-examined by counsel for the appellant after which this exchange took place between court and the prosecution officer.

Court: From the facts Mr. Prosecutor your charge should be for possession of video tape for purposes of hire.

P.O. : I leave it to the court to amend.

The matter was adjourned to June 16, 1980. At the resumed hearing A.S.P. Chong was re-examined. Then followed A.S.P. Adenar Umar who told the court that he went with A.S.P. Chong to the shop and it was he himself who censored the 240 tapes and found the two under the title "The Punished Lovers" obscene and tendered the tapes. After the close of the prosecution's case defence counsel said he would make a submission of no case but would require time to do this research. This was granted.

On June 19 counsel for the defence submitted that the accused was charged with possession. The court intervened and said that possession alone was not an offence and he would amend the charge as he had intended. It was amended to read:

"That you at about 1100 hours on the 17th day of December, 1979 at Shop No. 301, Seri Complex Bandar Seri Begawan, in the State of Brunei have in your possession 2 video cassette tapes for purposes of hire entitled 'The Punished Lovers' in that they contain the following obscene pictures, namely the visual representation of women and men in the nude and in sexual acts and you have thereby committed an offence under section 292(a) of the Penal Code."

The amended charge was read and explained to the accused who pleaded not guilty. The matter was then adjourned to June 23 and when defence counsel submitted that there was no case to answer prosecution officer asked for time to reply. This was granted. After the submission the learned magistrate found the accused had a case to answer and called on the defence to adduce evidence. The defence rested. The accused as I have said was found guilty and the learned magistrate gave his reasons in writing.

In his petition of appeal the appellant relies on 14 grounds but many of them are really duplications. They may be summarised as follows:—

(1) The magistrate was wrong in law in that the facts relied on by the prosecution could not come within the ambit of section 292(a) and he was further

wrong in deciding that the appellant had a case to answer.

(2) The magistrate was wrong in re-amending the charge after the prosecution had closed its case and after the defence had commenced his submission of no case at which time the appellant was facing an amended charge which was not an offence known to the law.

(3) The magistrate was wrong in admitting the two tapes as exhibits and was in any event wrong in convicting the appellant of being in possession of 2 tapes for purposes of hire when the magistrate had only viewed one tape and there was in any event no evidence of possession.

The first matter is in my view the important one and it boils down to this: Can a video tape be an obscene object within the meaning of obscene object under section 292(a) of the Penal Code. In the court below counsel for the defence submitted that the *ejusdem generis* rule applied and the genus was publication of obscene books, pamphlets, paper, drawing, paintings, representations or figures therefore the genus can include only articles of a printed nature showing something obscene on their faces and video tapes are not such articles. For this proposition he relied on the Malaysian case of *Public Prosecutor* v. *Tee Tean Siong & Ors.*[1] I shall deal with this case later. The prosecution relied on the Mischief Rule.

In his written judgment the learned magistrate said:

"I have considered the arguments of the defence counsel and the prosecution and it is my intention not to do violence to section 292(a) and I am also aware that strict construction must be given to a penal statute. Reading section 292(a) I am of the opinion that the phrase 'or any other obscene object whatsoever" should not be read *ejusdem generis*. To do so would defeat the mischief section 292(a) intends to remedy. Certainly, when the drafter of the Penal Code drafted section 292, video tapes were not in existence, but the drafter of the Penal Code had a foresight that obscene materials come in different forms and sizes. As such, he was prudent enough to include the phrase 'or any other obscene object whatsoever'. Video tapes would fall within the mischief of section 292(a). What is the mischief section 292(a) intends to remedy? It is none other than to protect the public from being exposed to such obscene materials and to prevent them from the corrupting influence of these obscene materials."

On appeal before me counsel for the appellant whilst still relying on the ejusdem rule and the genus being publication of obscene objects (I find this difficult to understand) went further and submitted that the particular objects mentioned in section 292(a) are all objects which could be obscene to sight or upon reading and a video tape was not such an object. The burden was on the prosecution to prove three ingredients constituting the offence: (a) the appellant had in possession, (b) for the purpose of hire, (c) an obscene object or objects. We are concerned now with (c). The section prohibits publication of any obscene book, pamphlet, paper, drawing, painting, representation, or figure or any other obscene object whatsoever. It is clear that all particular items set out are objects in themselves otherwise the word "other" would not appear in the general words. The word "object" means in this context a material thing and the attribute of the material thing is that it has to be obscene by reason of the governing adjective. The material thing or object complained of was a video cassette tape. I was not shown the tapes. In his finding of obscenity the learned magistrate said:

"On viewing the tapes (I viewed one tape only because Mr. Choo for the defence did not wish to view the second tape for reasons best known to him) I found that it highlights the act of sexual intercourse between certain male and female African characters in a certain village unnamed. The tape is divided into short stories and between these stories it contained several songs which purported to be the 'moral' of the stories.

The picture depicts permissive sex and it projects the image of a woman sex maniac, the stories of the revenge of a prostitute and the endless sexual pursuits of an African male."

He then went on to say

"Applying the test of Lord Cockburn C.J. I am satisfied that the tape is obscene for its tendency to deprave and corrupt the minds of the viewing public. . . ."

With respect I cannot agree with him. What he saw which was obscene was not the tape but the picture on a T.V. screen reproduced by means of inserting the tape on to a video tape recorder connected to a T.V. set. In my view the words of the section are so plain that no aid to construction is required. Under the section for an object to be obscene it has to be so to the sight or upon reading. It it were otherwise such as in the case of a video tape then every author, artist or sculptor capable of writing or producing an obscene book, drawing of figure is also an obscene object. I am unable to strain the language of the section to meet the justice of this case. In taking this view I am fortified by the judgment of Hashim J. in *Public Prosecutor* v. *Tee Tean Siong & Ors., supra.* In that case 9 accused were arrested trying to escape from premises raided by the police. The raiding party found a projector and four reels of films and the accused were charged under sections 109 and 292(a) of the Penal Code. Both jurisdictions have identical section 292(a).

"The learned magistrate after being satisfied as to the obscenity of these films convicted all of them under section 109 and 292(a)."

On revision

"Held: In the absence of other evidence mere attendance at a show where 'blue films' are exhibited does not amount to abetment of the offence of exhibition under section 292(a)."

The learned judge said at page 202:

"Section 292 of the Penal Code deals with matters contained in the Obscene Publications Act. Whether a film can be included in the term 'publication' as normally understood is another aspect to be considered. The Control of Imported Publications Ordinance now defines 'publication' to include 'any visible representation, any recording . . . of any cinematograph film . . .' but the definition of the same word in the Undesirable Publications Ordinance, 1949 would appear to be narrower and limited to what is generally understood to fall within the term 'publication', namely printed or written matter. If there is no offence then under the Penal Code, is there an offence under any other law?"

As I understand the learned judge what he said was section 292 was enacted to create offences against decency and morality as was the English Obscenity Act 1959. The English Act defines both the words "publication" and "articles" and for "articles" it is "any description of article containing or embodying matter to be read or looked at or both, any sound record and any film or other record of a picture or pictures." He then looked into the statute books of his jurisdiction to ascertain whether there was any

sanction against publication of articles in the class of sound recordings films and other records and set out three namely the Control of Imported Publications Ordinance, the Undesirable Publications Ordinance 1949 and section 24 of the Cinematograph Films Ordinance. He then said:

"In my view 'blue films' should not be charged under section 292(a) or section 109 and section 292(a) but under section 24 of the Cinematograph Films Ordinance."

If publication of "blue films" should not be charged under section 292(a) *a fortiori* neither should video tapes for a film at least can be seen against lighting but a video tape is opaque. I am unable to agree with the learned magistrate's contention that Hashim J.'s decision might have been otherwise if the mischief rule had been argued before him. This rule was well argued before me by the learned Solicitor-General but as I have said I am unable to apply it even to cure what is an obvious mischief. It has to be done by the legislature. For the reasons given the appeal is allowed. The conviction is set aside and the penalties imposed quashed.

I would not have interferred with the judgment on the other grounds of appeal as the appellant was represented throughout in the court below and no objection was raised to the procedural matters complained of on appeal. I agree with the Solicitor General that at best these were irregularities which the magistrate could cure under the wide powers given under the Criminal Proceedings Code. I also held that there was sufficient evidence of possession for the purpose of hire to support the magistrate's finding.

Appeal allowed.

Solicitors: *Choo Chan & Wong.*